United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

3-28

ORIGINAL

77-7002

To be argued by
Stanley A. Walton

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P/S

UNITED STATES COURT OF APPEALS

For The Second Circuit

JOHN COLEMAN,

Plaintiff-Appellant,

against

GOLKIN, BOMBACK & CO., INC., A Corporation; and SAUL GOLKIN,

Defendants-Appellees.

On Appeal from the United States District Court

for the Southern District of New York

REPLY BRIEF OF PLAINTIFF-APPELLANT JOHN COLEMAN

UNITED STATES COURT OF APPEALS
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WINSTON & STRAWN
Co-Counsel for Plaintiff-Appellant
John Coleman
Suite 5000
One First National Plaza
Chicago, Illinois 60670
(312) 786-5600

Stanley A. Walton
Of Counsel

LORD, DAY & LORD
Co-Counsel for Plaintiff-Appellant
John Coleman
25 Broadway
New York, New York 10004
(212) 344-8480

Stephen J. Crimmins
Of Counsel

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Statement of Facts	1
Reply Argument	3
I. The Coleman Post-Judgment Motion was timely made, and full compliance with Federal Rule 15(b) was achieved	3
II. The facts proven sustain the tort of conversion as a matter of law	9
III. The statute of frauds defense is not before this Court	10
IV. Coleman has standing under N.Y.B.C.L. §§ 719, 720	11
V. Laches, estoppel, and unclean hands are not an appeal issue, not applicable, and not proven	15
VI. Dollar damage computations not contested	16
Conclusion	17

TABLE OF AUTHORITIES

CASES

	Page
Bonhart v. Braunworth, -- Misc. --, 81 N.Y.S.2d 739, 740 (Sup. Ct., N.Y. Co. 1948)	13
Buttles v. Smith, 281 N.Y. 226, 236, 22 N.E.2d 350 (1939)	12
Goebel v. Clark, 242 App. Div. 408, 275 N.Y.S. 43 (4th Dept. 1934)	7
Hastings v. H.M. Byllesby & Co., -- Misc. --, 38 N.Y.S.2d 201, 203 (Sup. Ct., N.Y. Co. 1942)	12
Independence Discount Corp. v. Bressner, 47 App. Div.2d 756, 365 N.Y.S.2d 44 (2d Dept. 1975)	10
John H. Giles Dyeing Machine Co. v. Klauder-Weldon Dyeing Machine Co., 198 App. Div. 564, 190 N.Y.S. 726 (3d Dept. 1921), rev'd on other grounds, 233 N.Y. 470, 135 N.E. 854 (1922)	13, 14
Levy v. Paramount Public Corp., 149 Misc. 129, 266 N.Y.S. 271 (Sup. Ct. N.Y. Co. 1933); aff'd, 241 App. Div. 711, 269 N.Y.S. 997 (1st Dept. 1934), aff'd, 265 N.Y. 629, 193 N.E. 418 (1934)	14
Lilienthal v. Betz, 108 App. Div. 222, 95 N.Y.S. 849 (1st Dept. 1905), rev'd on other grounds, 185 N.Y. 153, 77 N.E. 1002 (1906)	13, 14
Miller v. Wells Fargo, 406 F.Supp. 452 (S.D.N.Y. 1975)	9, 10
McCoy v. American Express Co., 253 N.Y. 477, 171 N.E. 749 (1930)	9, 10
Rosenkranz v. Doran, 264 App. Div. 335, 338, 35 N.Y.S.2d 413, 415 (2d Dept. 1942)	12
Schreibman v. Chase Manhattan Bank, 15 A.D.2d 769, 224 N.Y.S.2d 977 (App. Div. 1962)	5, 6

Steele v. Isman, 164 App. Div. 146, 149 N.Y.S. 488 (1st Dept. 1914) 14

Weil v. Curtis, Mallet-Prevost, Colt and Mosle, 66 Misc.2d 466, 321 N.Y.S.2d 250 (Sup. Ct., N.Y. Co. 1970), aff'd, 36 App. Div.2d 1027, 322 N.Y.S.2d 628 (1st Dept. 1971), aff'd, 30 N.Y.2d 500, 280 N.E.2d 649, 329 N.Y.S.2d 818 (1972) 6

STATUTES

C.P.L.R. § 206(a)(1) 6, 7, 8

Fed. R. Civ. P. 15(b) 3, 5

N.Y.B.C.L. 11, 12, 17

OTHER

W. Prosser, Law of Torts § 16 (1971) 10

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Docket No. 77-7002

JOHN COLEMAN,

Plaintiff-Appellant,

-against-

GOLKIN, BOMBACK & CO., INC., a Corporation; and SAUL GOLKIN,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF PLAINTIFF-APPELLANT

JOHN COLEMAN

STATEMENT OF FACTS

We contest the following portions of the "Facts" described in the Golkin brief at the following pages:

At page 3: The allegations in the Coleman Amended Complaint are best shown in the document itself [A228] and not as tersely described by Golkin, particularly in the "Facts" section of his brief.

At page 5: It is categorically stated that, before Mr. Golkin bought his ownership in 1962, he did not review the schedule which stated that options were being held for employees not specifically named. This is in error because the record is clear that Mr. Golkin swore on oath that "I may have glanced through it***." [A 134]

At page 5: The Coleman Nominee Agreement [A 1] best says what is therein contained, rather than as it is tersely described in the Golkin brief.

At pages 6 - 9: Much time is spent rehashing a fact question not on appeal, to wit, what exact date the Nominee Agreement was executed. Judge Cannella discussed that at 256, 261-62. The plea is made that no written evidence was available to Golkin at the time he purchased into the corporation that a specific interest of John Coleman, by name, existed then. This may be technically true as to that purchase date, but it is immaterial to the case and the specific appeal issues.

At page 9: The charge that the Nominee Agreement "was kept secret" from Golkin is a flagrant abuse of the record. Neither the cited transcript pages [Tr. 122-03], nor any other portions of the record, say anything of the sort. More important, the Court made a careful fact finding to the contrary, to wit, it was not a secret and not designed to saddle the new owners with a hidden burden. [A 260-01]

REPLY ARGUMENT

For the convenience of the Second Circuit, Appellant Coleman's Reply Argument will follow the organizational outline utilized by Appellee Golkin in his answering brief, together with page references into our main brief, so the Court can, if it wishes, readily find our position on the particular issue under discussion.

POINT I

THE COLEMAN POST-JUDGMENT MOTION WAS TIMELY MADE, AND FULL COMPLIANCE WITH FEDERAL RULE 15(b) WAS ACHIEVED

Most of the Golkin brief on this point is addressed and answered in our main brief (at pages 12-17) and will not be repeated. We most respectfully repeat that this is not a matter available to the Court's discretion. We will, therefore, only address the following points:

A. Golkin Consent Was Present

Without citing any cases, Golkin claims he gave no express or even implied consent to the conversion theory at trial. If cases had been cited, they would have shown that implied consent is derived from the absence of formal objection as to evidence submission.

This also makes sense logically because of the fact Rule 15(b) exists at all. Surely every victorious party facing a post-judgment Rule 15(b) motion by his opponent would allege "no consent." After all, who "consents to any suit?

The failure to object was most dramatic in this suit. When the counsel for Coleman was asked by the District Court for an "opening statement", he responded in the broadest possible fashion by merely saying, "I am going to simplify this, we are seeking Mr. Coleman's commission." [Tr. 5] In the face of such broad charges, the Golkin attorney agreed to submission of all prior depositions and all non-privileged exhibits into evidence as they were transcribed without any qualification whatsoever! [Tr. 27-32, 100-04] Among the other technical effects this had was a sweeping waiver of any and all Golkin objections in those depositions. It is therefore hard to imagine a greater example of "implied consent" than exists here.

B. No Prejudice; Facts Not Controvertible; Trial Disjointed Anyway

Moreover, our conversion argument is build upon a limited number of basic, obvious and incontrovertible facts to which we suggest objections would not have been sustained had they been made in the first place.

We repeat from our earlier brief that no retrial or new evidentiary hearing is needed,* that this was a bench trial, and that Judge Cannella himself departed from a strict adherence to the pleadings in passing on certain legal theories he had apparently thought up on his own (see the contractual interference discussion at A 264-69).

Moreover, when the parties left the courthouse on August 4, 1975, no law had been cited to the court or

* Despite invitations, Golkin has not even attempted to show any facts he wants to challenge and has not requested a hearing for the introduction of additional evidence.

legal arguments made on the substantive issues and it understood that Findings of Fact and Conclusions of Law would follow later. Indeed, there was really no "trial" here in a traditional sense but a series of legal events leading toward a ruling. On August 4, 1975 Judg Canella, for example, had heard only about 40% of the evidence (by actual transcript pages). Surely it could not have been successfully argued in the fall of 1975 that Coleman not be permitted to cover the tort of conversion had it been specifically cited in its Conclusions of Law at that time. If that be so, what greater prejudice occurred in raising it after the Court's Opinion, given the wide parameters of Rule 15(b)?

C. The Conversion Claim Is Not Barred by The Statute of Limitations

Nothing more frustrates clarity in an appeal than when a lawyer has his own position on a matter blatantly misstated by an opponent. Golkin counsel must be blind to state at page 19 of their brief that we claim the conversion occurred in December 1967. Pages 20-22 of our main brief address that issue, and we are certain it occurred in February 1971. All we said about December 1967 was that, even if the Court held that the conversion occurred then, Coleman is still not barred by any limitations. (See Coleman brief pages 22-24.) We discuss that again hereafter.

Golkin cites this Court to Schreibman v. Chase Manhattan Bank, 15 A.D.2d 769, 224 N.Y.S.2d 977 (App. Div. 1962) apparently to show the conversion occurred in 1967. It is inapposite to our situation. That opinion does not sufficiently describe the

facts enough to inform the reader as to when the defendant bank applied the funds of plaintiff to its own use. It could have occurred immediately upon deposit or several years after deposit. But enlightenment on that factual point would still not make the case relevant because in the instant suit there was no fund of any money in anybody's possession until a few months before our suit was filed. The actual funds in our case did not sit around somewhere for several years as they have in Schreibman, supra.

We will discuss our alternative argument based on C.P.L.R. 206(a)(1) because the word "demand in that statute is stressed by Golkin's answering brief. As of December 1967, Coleman could not have had a cause of action for conversion unless he first made a demand upon Golkin and had that demand rejected by Golkin. The reasons for this are twofold:

First, the Nominee Agreement plainly states that the Amco shares were to be held by Golkin as custodian after the exercise of the option. Thus, under the plain terms of the Nominee Agreement, Golkin was in lawful possession of the Amco shares (though holding them for the benefit of Coleman, among others). Where a defendant has lawful possession of property but where a plaintiff has an immediate right to such property, a demand is necessary in order to change defendant's possession from a lawful one to an unlawful conversion. Weil v. Curtis, Mallet-Prevost, Colt and Mosle, 66 Misc. 2d 466, 321 N.Y.S. 2d 250 (Sup. Ct., N.Y. Co. 1970), aff'd, 36 App. Div. 2d 1027, 322 N.Y.S. 2d 628 (1st Dept. 1971), aff'd, 30 N.Y. 2d 500, 280 N.E. 2d 649, 329 N.Y.S. 2d 818 (1972).

Second, even if it could be said that Golkin's possession of the Amco shares during the period following December 1967 were an unlawful conversion, it cannot now be said that Golkin acted with knowledge. Despite evidence submitted by Coleman to the contrary, the District Court herein found as a fact that Golkin did not have knowledge of Coleman's rights during the period December 1976 through early 1971. The District Court merely found that Golkin acted in a "cavalier" (we submit negligent) fashion with respect to Coleman's rights. Of course, under New York law, even an innocent conversion renders one liable to the rightful owner of the property in question. Where the conversion is not knowing, but rather merely negligent (or even innocent), New York law requires that a demand be made upon defendant as a prerequisite to a cause of action for conversion. Goebel v. Clark, 242 App. Div. 408, 275 N.Y.S. 43 (4th Dept. 1934).

Since, as discussed above, it was necessary for Coleman to make a demand upon Golkin in order to have a conversion cause of action during the period December 1967 through February 1971, and since no such demand was made by Coleman during said period, the statute of limitations for conversion could not have begun to run during that period.

This is on account of the tolling provision contained in C.P.L.R. § 206(a)(1). As discussed in detail in our main memorandum, C.P.L.R. § 206(a)(1) provides that, where a demand is necessary to entitle a person to commence an action and where the plaintiff's right grows out of the detention of money or property by a fiduciary (as Golkin was under the Nominee Agreement), the time within which the action may be commenced

shall be computed "from the time when the person having the right to make the demand discovered the facts upon which the right depends." As noted above, even if one accepts the erroneous December 1967 date of conversion pressed in Golkin's answering brief, a demand upon Golkin would have been necessary in order for Coleman to have a conversion cause of action.

Thus, under C.P.L.R. § 206(a)(1), the conversion statute of limitations would only begin to run from the date on which Coleman actually discovered the facts upon which his right to make a demand depended. Coleman discovered the facts in spring 1971 when he met Marshall Berman at a social gathering. Coleman made his demand upon Golkin and filed this suit within weeks thereafter.

Despite this, Golkin's answering brief argues that, even under C.P.L.R. § 206(a)(1), Coleman "should have discovered" the facts upon which his right to make a demand depended at an unspecified date earlier than spring 1971. This is false and misleading. An examination of C.P.L.R. § 206(a)(1) shows that the statute provides that the time runs "from the time when the person *** discovered the facts upon which the right [to make a demand] depends ***" [emphasis added]. This statute does not say "should have discovered"; the statute says simply "discovered". This is a plain misstatement of the law by Golkin. Even if this were the law, a spring 1968 day for discovery of Golkin's December 1967 actions would patently be reasonable and would make Coleman's spring 1971 action timely.

POINT II

THE FACTS PROVEN SUSTAIN THE TORT OF CONVERSION AS A MATTER OF LAW

Claiming the Coleman initial brief "bored" this Court when it recited all the elements of the tort of conversion, Golkin blithely ignores the entire issue except "one element," to wit, whether or not Coleman had legal ownership or a superior right of possession. We treat these omissions as a concession by Golkin that all other elements of the tort are met.

Because we cannot improve upon our earlier discussion of the one tort element bothering Golkin, we invite the Court's attention to pages 19-22 of our main brief, and also we reply to the two cases Golkin cites attacking our prior analysis.

Mr. Golkin, we submit, must do better than cite the cases of McCoy v. American Express Co., 253 N.Y. 477, 171 N.E. 749 (1930) and Miller v. Wells Fargo, 406 F. Supp. 452 (S.D.N.Y. 1975) in order to successfully assault our position. The only notable thing about McCoy, supra, is that the jurist was Benjamin Cardozo and the attorney was named Mr. Javits. The plaintiff proferred a conversion theory to enforce a purely equitable right. The plaintiff had lent money to a non-party in return for a verbal promise that certain carpets of the borrower would be held exclusively by him as security for the debt. Wehn the debt was not paid, the lender sued an innocent carrier which had moved the rugs, at the behest of the debtor, from one location to another, claiming the carrier had "converted" them. At several places in the opinion it was stressed that "no documents of title" were ever issued to the lender or given to the warehouse or to the

carrier. All plaintiff had was a right to go to a court of equity and tell his story. He was not even suing the debtor, but an otherwise innocent third party. More important, he had not one scrap of paper as evidence of the arrangement with the debtor. Prosser would agree with that decision as would the court in Independence Discount Corp. v. Bressner, 47 App. Div. 2d 756, 365, N.Y.S. 2d 44 (2d Dept. 1975), a case we agreed with in our earlier brief.

The case of Miller, supra, cited by Golkin for this issue, supports Coleman! In Miller, supra, New York federal Judge Milton Pollack cited McCoy, supra, for the rule that pledges are invalid absent the existence of "tangible property or an instrument evidencing it . . . . [Emphasis added]." Miller, supra, at page 469.

The argument of Golkin that the tort of conversion excludes "equitable rights" misses the point and is misleading. What conversion really will not protect are pure intangibles and real estate. Prosser, Law of Torts § 16 (1971). Purely equitable rights are frequently intangible; hence the maxim.

POINT III

THE STATUTE OF FRAUDS DEFENSE IS NOT BEFORE THIS COURT

Golkin wastes six pages in his brief on this dead issue. Unless requested by this Court, Coleman will not respond at all because it cannot be before the Court.

The District Court ruled below on this question in favor of Coleman [A 261-62, 272], and Golkin filed no cross-appeal whatsoever to this Court. Our most charitable explanation as to why Golkin raises it is that counsel inadvertently included this argument by accident when using his trial court briefs as the strict basis for his Second Circuit brief, a lapse we all occasionally experience.

POINT IV

COLEMAN HAS STANDING UNDER N.Y. B.C.L. §§ 719, 720

A. Only One Element Ruled Upon Below

While it may not aid this Court in deciding our appeal, the fact is that nearly all the B.C.L. issues presented to Judge Cannella, and to this Court in our earlier brief, were never discussed by that Court. We explain this at the outset because it is in that context that this Court is getting this case.

The only element addressed by the District Court was whether or not the Coleman claim "accrued prior to the alledgedly improper transfer." It ruled in the negative in a terse manner (A 264) which never analyzed the question. We conjecture the Court was not fully conversant with the facts.

Our main brief discussed the blatant error of that holding at some length (at pages 39-42), but to our surprise the Golkin brief before this Court never addressed that issue. We can only assume that while perhaps Golkin is pleased by the ruling below he cannot sustain it substantively and cannot successfully assail our position on that question.

Therefore, we urge that the specific District Court's ruling on the B.C.L. question must fall, not only because it lacks any support but also by sheer default of Golkin before this Court.

B. Coleman Has Standing Under The B.C.L.

The Golkin arguments before this Court continue to mystify us. Here is yet another example. The only issue under the B.C.L. addressed by Golkin, but not discussed at all by Judge Cannella, was whether or not Coleman had standing to press a suit under the B.C.L. prior to October 22, 1976 when Judge Cannella's judgment was entered against the Corporation.

What makes such an argument by Golkin even more confounding is that the whole question is now rendered moot by our having become a judgment creditor of the corporation on October 22, 1976. No applciable statute of limitation bars Coleman now, even at this late date. If this Court should decide to apply the judgment creditor rule to the facts of this case (despite the futility of obtaining a judgment against a corporation without assets), then Coleman's cause of action would only have accrued, and the statute of limitations only have begun to run, on October 22, 1976, when Coleman got his judgment against the corporation (which is now final, since the corporation has not appealed). Buttles v. Smith, 281 N.Y. 226, 236, 22 N.E. 2d 350 (1939); Rosenkranz v. Doran , 264 App. Div. 335, 338, 35 N.Y.S. 2d 413, 415 (2d Dept. 1942); Hastings v. H. M. Byllesby & Co., --Misc. --, 38 N.Y.S. 2d 201, 203 (Sup. Ct., N.Y. Co. 1942).

C. Coleman Had Standing In 1971 Also

We will, however, not ignore the Golkin attack on our position, which Golkin puts forth on pages 32-37 of his answering brief. The New York courts have created a plain exception to the judgment creditor rule to save plaintiffs from just the sort of paper exercise to which Golkin wants to put Coleman. As stated by the court in Bonhart v. Braunworth, -- Misc. -- , 81 N.Y.S. 2d 739, 740 (Sup. Ct., N.Y. Co. 1948):

> ***[W]here it appears that prosecution of the claim to judgment would avail the creditor nothing, no such useless effort is required.

In that case, the court squarely applied this rule in determining the legal sufficiency of a complaint.

In the early case of Lilienthal v. Betz, 108 App. Div. 222, 95 N.Y.S. 849 (1st Dept. 1905), rev'd on other grounds, 185 N.Y. 153, 77 N.E. 1002 (1906), the court held:

> *** The complaint alleging facts which make it impracticable to obtain a judgment against the corporation, any question as to the necessity of alleging that such judgment had been obtained and execution thereon returned unsatisfied is not presented. ***

108 App. Div. at 223, 95 N.Y.S. at 850.

Commenting on Lilienthal, the court in John H. Giles Dyeing Machine Co. v. Klauder-Weldon Dyeing Machine Co., 198 App. Div. 564, 190 N.Y.S. 726 (3d Dept. 1921), rev'd on other grounds, 233 N.Y. 470, 135 N.E. 854 (1922), stated:

> While the judgment in that case [Lilienthal, supra] was reversed ***, the above holding [quoted immediately above] stands as it was reversed on other grounds. ***[T]he courts do not require useless efforts to be made which, by the nature of things involved, cannot produce results ***.

198 App. Div. at 573-74, 190 N.Y.S. at 733.

This exception to the judgment creditor rule was reiterated in Levy v. Paramount Public Corp., 149 Misc. 129, 266 N.Y.S. 271 (Sup. Ct., N.Y. Co. 1933), aff'd, 241 App. Div. 711, 269 N.Y.S. 997 (1st Dept. 1934), aff'd, 265 N.Y. 629, 193 N.E. 418 (1934):

> *** In the Lilienthal Case [supra], the court held that a creditor whose claim has matured may bring an action, provided he can show that it would be futile to obtain judgment against the corporation.
>
> In [Giles, supra] the court affirmed the general principle that it would not require a useful [sic] effort to be made which would be productive of no results ***.

149 Misc. at 132-33, 266 N.Y.S. at 275.

Golkin's attempts to tell us that this is somehow not the law of New York are pitiful. For example, in discussing Steele v. Isman, 164 App. Div. 146, 149 N.Y.S. 488 (1st Dept. 1914), (1) Golkin fails to mention that the court there plainly states the foregoing exception to the judgment creditor rule, 164 App. Div. at 149, and (2) Golkin misstates the facts of the case. In Steele, plaintiff's argument was not "exactly the same argument advanced by Coleman herein, *** that the obtaining of a judgment would be futile since the corporation had been dissolved." [Golkin brief, p. 33] Indeed the argument could not be the same, since in Steele the court "noted *** that there is no allegation that the corporation is insolvent ***," 164 App. Div. at 147.

D. Golkin Misinterprets District Court "Cavalier" Description

Judge Cannella described the actions of Golkin as "cavalier." [A 267] Golkin claims this was meant by the trial judge to describe only the Golkin attitude toward his own company. Perhaps Golkin believes in Santa Claus, too. Nowhere in the record is there any basis for even an inference to such an interpretation. Quite the contrary, in that sentence the Court uses the phrase "... or against the interests of the corporation ..." Also, it was stated in that portion of the Opinion dealing with individual liability to Coleman. At its broadest, the phrase encompassed all interested entities, but surely not the corporation alone.

POINT V

LACHES, ESTOPPEL, AND UNCLEAN HANDS ARE NOT AN APPEAL ISSUE, NOT APPLICABLE, AND NOT PROVEN

We will not dwell on the three (3) equitable defenses of laches, estoppel, and unclean hands, because by the very nature of the relationship, by the language of the Nominee Agreement, and by the judgment below most of all, the only duty to affirmatively communicate was upon Golkin, not Coleman.

The Agreement requires this: "Divine & Fishman agrees that it shall consult with Coleman with respect to exercise or sale of the option or any shares acquired thereunder." [A 245] Again Golkin overlooks the importance of the judgment below against the corporation. These same arguments by Defendants were rejected below. There was a specific holding, not appealed by

either Defendant, that the "consultation" clause was "breached." [A 260] This issue has been decided, was not cross-appealed, and is not before this Court.

Parenthetically, we cannot let pass the erroneous factual charge in the Golkin brief (at page 38) that "Coleman underwent numerous changes of address" and was therefore difficult to locate. That is 100% contrary to the undisputed facts. When he was with the corporate Defendant Coleman worked in their Chicago office [Tr. 33] and, thereafter, at all times Coleman had an office in downtown Chicago under his name and was listed in the Chicago phone directory. [Tr. 93-4] Only during the period 1969-70, when nothing crucial was occurring in the history of this matter, was he outside Chicago for any extended time periods. [Tr. 80-2]

POINT VI

DOLLAR DAMAGE COMPUTATIONS NOT CONTESTED

We point out that Golkin has not challenged our damage computations under the conversion charge which we proferred in our earlier brief (at pages 24-26).

Basically this same arithmetic was adopted and approved by the trial court in awarding Coleman $80,000 under our contract claim against the corporation.

By not having filed a cross-appeal, taken together with a failure to challenge our prior brief on this point, we believe that Golkin has waived all rights to challenge any of our dollar damage computations.

CONCLUSION

The Appellant Coleman seeks from this Court an outright reversal with respect to the denial of the Coleman motion to require a ruling on the conversion theory against Saul Golkin.

Thereafter, we seek a judgment from this Court on the conversion issue and an outright reversal of the judgment in favor of the director and officer Saul Golkin respecting statutory liability under the B.C.L.

We submit there is no need at all for a remand because all the facts and all the law that are required to rule on all aspects of this appeal are already of record and no party has requested a hearing for more evidence.

Dated: New York, New York
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Respectfully submitted,

WINSTON & STRAWN
Co-Counsel for Plaintiff-Appellant
John Coleman
Suite 5000
One First National Plaza
Chicago, Illinois 60670
(312) 786-5600

Stanley A. Walton
Of Counsel

LORD, DAY & LORD
Co-Counsel for Plaintiff-Appellant
John Coleman
25 Broadway
New York, New York 10004
(212) 344-8480

Stephen J. Crimmins
Of Counsel